IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 616

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S ELECTRIC CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The Opinion of the United States Court of Appeals (R. 6)[1] is reported at 379 F. 2d 211.

Jurisdiction

The judgment of the Court of Appeals was entered June 22, 1967 (R. 4). The petition was filed September 14, 1967, and was granted December 4, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1254(1) and Section 24 of the Bankruptcy Act, as amended.

[1] "R." references are to the Joint Appendix.

Question Presented

Whether employer payments to the Annuity Fund of the Electrical Industry, all of which are earmarked and credited to the individual accounts of named workmen, are entitled to the priority accorded to "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act.

Statute Involved

As of the dates involved in this case, the statute involved provided in pertinent part:

"Bankruptcy Act, c. 541, 30 Stat. 544:

> "Section 64 (as amended by Sec. 1 of the Act of June 22, 1938, c. 575, 52 Stat. 840, and Sec. 1 of the Act of July 30, 1956, c. 784, 70 Stat. 725). *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, * * * ; (4) taxes legally due and owing by the bankrupt to the United States * * *."
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> (11 U. S. C. 1964 ed., Sec. 104.)

Statement

Since 1954, pursuant to collective bargaining agreements with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (herein called "Local No. 3"), virtually all employers in the electrical construction industry in the New York area, including the A & S Electric Corp., contributed each week to the Annuity Fund on behalf of each employee the sum of $4.00 for each day worked, which sums have been credited to their individual accounts. Every month each employee receives a statement setting forth every payment made into his account and his balance in his account (R. 44).

On January 9, 1963, A & S Electric Corp., the bankrupt, filed its petition under Chapter XI, Section 322, for an arrangement and was adjudicated on November 6, 1963 (R. 23).

The Joint Industry Board of the Electrical Industry, an unincorporated association, filed its proof of claim, No. 4, in this proceeding for an indebtedness in a total amount of $10,537.34. That total sum included $5,114.00. which the bankrupt failed to pay claimant pursuant to the Annuity Plan of the Electrical Industry Agreement, and represents the total of $4.00. per day contributions for each day worked by each employee (R. 23). The said $5,114.00. was required to be credited as follows:

Social Security Number	*Name*	*Annuity*
115-18-1511	W. Bantel	$ 184.00.
104-28-3513	T. J. Cleary	190.00.
237-18-9084	A. M. Condrey	180.00.
129-14-0808	W. J. Conkling	188.00.
090-12-4690	M. J. Conlon	180.00.

Social Security Number	*Name*	*Annuity*
071-32-7765	J. J. Constantino	184.00.
085-32-1620	V. Cupola	160.00.
123-34-5496	F. Dellaquila	176.00.
074-20-9463	F. A. Dooner	188.00.
089-14-8404	J. J. Hanaford	128.00.
365-16-6616	G. A. Hester	Terminated
113-34-3428	E. A. Hoffman	204.00.
067-09-8572	W. Hoffman	80.00.
130-32-6461	P. Horacek	128.00.
415-20-7994	J. P. Jones	4.00.
076-34-1874	I. Katzman	180.00.
129-28-4306	D. R. Kimmel	204.00.
244-10-6897	L. M. Lawing	44.00.
156-18-1875	L. Lunau	112.00.
107-07-7008	E. McCarthy	132.00.
084- 8-9665	L. Micene	84.00.
086-16-6165	B. Miller	180.00.
099-23-4730	A. V. Newberry	48.00.
071-18-9186	C. Perlstein	128.00.
114-28-3247	J. Perretta	172.00.
085-36-4504	J. Ragozino	112.00.
073-34-8440	A. Reiss	192.00.
089-30-3542	E. Renzulli	180.00.
123-32-5000	M. Salzano	104.00.
119-32-5744	T. Scully	192.00.
101-07-6505	C. Sjoli	148.00.
110-28-0132	B. F. Stringfield	92.00.
085-34-3251	T. J. Watson	180.00.
123-20-1852	B. Wimpel	128.00.
126-30-2303	J. C. Ziegler	176.00.
051-18-1701	H. Hallums	100.00.
066-17-0791	C. Gibson	8.00.

Social Security Number	*Name*	*Annuity*
374-30-7364	J. R. Roberts	24.00.
076-22-6606	W. Beaman	12.00.
254-18-2408	M. Sims	8.00.
	Total	$5,114.00.

(R. 51-52). Rather than file 40 individual claims or obtain 40 individual assignments, the Joint Board included the said $5,114.00. in its single proof of claim.

The Government filed a proof of claim for internal revenue taxes in the arrangement proceeding in the amount of $15,587.55. The debtor-in-possession during the arrangement failed to pay certain taxes and supplemental statements of internal revenue taxes were filed in the amounts of $4,343.58 and $31.27 (R. 39).

On June 14, 1965, the trustee and Joint Industry Board entered into a stipulation, whereby they agreed, among other things, that the $5,114.00. would be allowed as a priority wage claim. The stipulation, together with a proposed order to approve it, was submitted for the signature of the Referee (R. 23).

The Referee decided that the $5,114.00. was not entitled to priority under Section 64a(2) of the Bankruptcy Act (R. 39). On appeal the United States District Court for the Eastern District of New York entered an order confirming the order of the Referee (R. 11). Upon appeal from this order the Court of Appeals affirmed (R. 6).

The pertinent facts relating to the operation of the Annuity Plan are not in dispute and are set forth in the affidavit of Harold Stern, Esquire, attorney for the Joint Industry Board (R. 43-48).

Pursuant to the provisions of the Annuity Plan every employee receives all the money credited to his individual account when he exercises any of the options provided in the Plan (R. 8, Annuity Booklet, pp. 11-13, 15-16). If he ceases to be a participant, he loses only the right to death benefits (Annuity Booklet, p. 15) which benefits are payable out of the available income earned by the Annuity Fund (R. 45-46, Annuity Booklet, pp. 9-11). If he waits until he retires or becomes disabled he receives his equity in monthly installments, plus dividends, and if he dies, his beneficiary is entitled to the monies credited to his account plus death benefits (R. 8).

No employee has ever been deprived nor can he be deprived of any of his equity in the Annuity Fund (R. 44, 46).

Summary of Argument

The question here is whether employer payments to the Annuity Fund of the Electrical Industry, all of which are earmarked and credited to the individual accounts of named workmen, are entitled to the priority accorded to "wages * * * due to workmen" within the meaning of Section 64a(2) of the Bankruptcy Act. The Courts below answered this question in the negative for the sole reason that the decision of this Court in *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 79 S. Ct. 554 (1959) was believed to be controlling.

We believe that the decision in *Embassy*, which concerned a Health and Welfare Fund, was not intended to be applied to pension funds. Pension funds, particularly funds qualified under Section 401 I. R. C., possess signif-

icant characteristics which entitle them to a wage priority under Section 64a(2) of the Bankruptcy Act. The Annuity Fund of the Electrical Industry, in addition to being a qualified Plan pursuant to Section 401 I. R. C., possesses special characteristics which entitle it to a wage priority.

ARGUMENT

The claim filed by the Joint Industry Board of the Electrical Industry on behalf of the participants in the Annuity Fund is entitled to a wage priority pursuant to Section 64a(2) of the Bankruptcy Act.

Every week the employers engaged in the electrical construction industry in the New York area remit to the Joint Board $4.00 for each day worked by every employee. These sums are credited to the individual employee's account. Every month each employee receives a statement setting forth the total contributions received in his behalf together with the interest currently added thereto—his total vested interest in the Annuity Fund.

Clearly, these sums possess the essential characteristics of wages. The receipt of these wages by the employee is postponed so long as the employee wishes it to be postponed. By ceasing to work for contributing employers he may "cease to be a Participant" at any time.

While an employee continues to be a Participant,

(a) the money is saved for his benefit;

(b) payment of income tax is deferred until he receives the money, which would usually occur when his annual income—and the tax rate—is low;

(c) upon his death his beneficiary receives the balance which remains credited to the deceased employee's account and a death benefit, earned by the Annuity Fund's investments.

Thus, the principal difference between money paid direct to the employee and placed by him in a savings account and money saved on his behalf in the Annuity Fund is the postponement of income tax liability and the income tax saving to the employee. Surely this legal tax benefit does not take these payments out of the category of "wages" for any purpose other than tax purposes.

Relying upon *United States* v. *Embassy Restaurant, Inc.*, the United States Court of Appeals affirmed the order of District Judge George Rosling, and held that the Joint Industry Board's claim for $5,114.00 is not entitled to a wage priority. The decisions below appear to be the only reported cases relating to employer payments made to a fund comparable to the Annuity Fund herein.

In *Embassy*, this Court denied wage priority to the claim of a Welfare Fund which was used to purchase life insurance, medical, surgical and other welfare benefits which could not assist any individual workman unless he became ill or died.

In order to establish that the Annuity Fund of the Electrical Industry possesses such substantial characteristics of wages that it is entitled to a wage priority under Section 64a(2) of the Bankruptcy Act, we here set forth reasons why this Court's decision in *Embassy*, relied upon by the courts below, is inapplicable to pension funds in general, and is inapplicable to the Annuity Fund *a fortiori*.

The employees covered by nearly all private pension funds now have such substantial interests in the deferred compensation which has been contributed in their behalf, that these contributions should be treated as wages under Section 64a(2). Were this Court so to find, it might well choose at least to limit the effect of *Embassy* to the type of fund involved in that case.

As a result of the changes brought about by collective bargaining, unilateral employer decisions and Federal regulations and recommendations which occurred after the date of this Court's decision in *Embassy,* most private pension plans now provide that the funds therein do belong to the employees.

The primary characteristic of pension plans that guarantees to employees their pension benefit is known as vesting.

> "Vesting is defined as a guarantee to the worker of a right or equity in a pension plan based on all or part of his accrued retirement benefits should his employment terminate before he becomes eligible for retirement benefits. If his rights are vested, the worker is entitled to a future retirement benefit when he reaches retirement age, regardless of where he may be at the time. Through vesting, a worker can build up retirement benefits from more than one employer." [2]

A study by the Bureau of Labor Statistics of 300 large collectively bargained pension plans in 1952 showed that only 25% of the plans had vesting; in 1958, the Bureau

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[2] "Labor Mobility and Private Pension Plans," United States Department of Labor, Bureau of Labor Statistics Bulletin No. 1407, at p. 11.

found that almost 60% of a similar group of negotiated plans had vesting. Since 1958, the trend toward adding a vesting provision to existing plans has continued, especially in bargained plans. In 1961, in the Bureau's study of private pension plans covering 15.6 million workers, vesting was provided by two out of three private pension plans covering three out of five workers.[3]

The Bureau predicts that private pension coverage "will continue to grow, possibly doubling from 1960 to 1980—a rate of increase substantially greater than the expected rate of increase in the labor force. Counteracting to some extent the mobility effects of the spread of pension plans is the trend towards liberalization and extension of vesting, early retirement, and portable pension credits. Furthermore, interest in special provisions, such as special early retirement, that alleviates displacements caused by technological and other change and plant shutdown, may be expected to increase."[4]

As of June 1966, private pension plan benefits were computable, at the 10 year service level, for almost three-fifths of the plans under study with vesting covering slightly more than half the workers. In more than four out of five plans, covering nine out of ten workers, vesting was possible with 15 years of service.[5]

In 1957, among 99 major pension plans under collective bargaining covering production workers, selected for summary by the Bureau of Labor Statistics, 57 had vesting

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[3] BLS Bulletin No. 1407, at p. 11.

[4] BLS Bulletin No. 1407, at p. 51.

[5] "Private Pension Plan Benefits," Bureau of Labor Statistics Bulletin No. 1485, p. 85.

provisions. By 1961, 19 of these provisions had been improved and 5 of the remaining plans added vesting provisions, and other plans reduced age or service requirements or both. By 1964, vesting provisions were again improved in 15 of these plans and age and service requirements were liberalized, or age requirements dropped completely, in other plans.[6]

With respect to salaried employees, between 1963 and 1965, normal retirement provisions were liberalized in more than one-half of the 50 major plans studied. 39 of these plans had vesting provisions, and only 17 of them had an age requirement for all workers.[7]

In 1965 the President's Committee on Corporate Pension Funds and other Private Retirement and Welfare programs reported to the President and recommended that the Internal Revenue Code be amended to require that all private pension plans, in order to qualify for favored tax treatment, "must provide some reasonable measure of vesting for the protection of employees." According to the President's Committee, "Vesting validates the accepted concept that employer contributions to pension plans represent 'deferred compensation', which the individual worker earns through service with his employer."[8]

As of August 1967, "Nearly all the older workers (between 50 and 64) now covered by pension plans are likely

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[6] "Recent Changes in Negotiated Pension Plans" and "Changes in Negotiated Pension Plans, 1961-64," Monthly Labor Review of the United States Department of Labor, Bureau of Labor Statistics, May 1962, pp. 528, 531 and October 1965, p. 1218.

[7] "Changes in Pension Plans for Salaried Employees," Monthly Labor Review, April 1966, p. 383.

[8] "Vesting of Private Pensions: Implications for Public Policy," Monthly Labor Review, March 1965, pp. 310-311.

to qualify for pension because most have completed the required 10, 15 or 20 years of credited service. Over one-third of the workers surveyed said they had already acquired vested rights to pension benefits. Workers without vested rights usually had enough years of credited service to qualify for a pension under most plans or were young enough to earn that service before reaching retirement age. Few workers of this age with this amount of service are separated from their jobs, even involuntarily, before retirement; nearly all are likely to qualify for pension."[9]

Terminations:

Unfortunately, the increase of private pension plans has been accompanied by "A marked upward trend in the frequency of pension plan terminations",[10] frequently due to funding difficulties and business dissolutions.

Each year since 1961, more than 15,000 bankruptcy cases involving businesses were commenced and terminated in the United States District Courts.[11] These bankruptcies presumably resulted in the termination of numerous pension plans. Statistics are unavailable.

Until 1962, the Internal Revenue Code contained no provision governing plan termination. In that year Section

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[9] "Private Pension Plan Coverage of Older Workers," Monthly Labor Review, August 1967, at p. 47.
53% of the older men and 28% of the older women in private nonfarm jobs were covered by a pension plan in their present job or had vested rights from some previous job. *Id.* at p. 51.

[10] "Termination of Pension Plans: 11 Years' Experience," Emerson H. Beier, Monthly Labor Review, June 1967, at p. 26.

[11] Tables of Bankruptcy Statistics (ending June 30, 1966) of the Administrative Office of the United States Courts, Washington, D. C., at p. 4.

401(a) was amended to require, as a further condition of qualification, that:

> "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the right of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employee's accounts are non-forfeitable" (76 Stat. 809).

In September, 1963, the Treasury issued regulations to put meat on the statutory bones (Treas. Reg. Section 1.401-4 and 1.401-6; 28 Fed. Reg. 10115, 10119-21). On account of this amendment to Section 401 the employees covered by pension funds which became qualified since 1962—and perhaps also the pension funds which became qualified prior to 1962—must, upon termination of these funds, immediately receive all of their equities in the funds. Distribution cannot, of course, be made of money that has not been collected. "Most pension plans do not, at any one point in time, have sufficient resources to fully discharge all of their liabilities".[12]

Clearly, therefore, whenever a bankruptcy results in the termination of a pension fund, at least if said fund was qualified since 1962, the failure to grant a wage priority to the pension fund must result in depriving the employees of a part of their compensation.

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[12] Beier, "Termination of Pension Plans," Monthly Labor Review, June 1967, at p. 28.

When a bankruptcy involves a member of a multi-employer pension plan, such plan may well survive the bankruptcy, albeit with a consequent strain upon the fund's ability to make its agreed upon payments to the participants. In any event, the effect of a denial of a wage priority to pension funds must be to tend to deprive employee participants of sums of money which they otherwise would receive.

The Embassy Decision Is Inapplicable to the Annuity Fund:

This Court in *Embassy* denied a wage priority to the Welfare Fund for four reasons, all inapplicable to the Annuity Fund herein, as follows:

> (a) "Let us examine the nature of these contributions. They are flat sums of $8. per month for each workman. The amount is without relation to his hours, wages or productivity" (359 U. S. 32).

Contributions to the Annuity Fund are at a flat rate of $4.00 for each day worked, and are thus related to the time worked, while the contributions to Embassy's Welfare Fund were related solely to the calendar. Wages of workmen are, of course, customarily based upon time worked.

The contributions to private pension funds covering craftsmen and production workers typically are sums equal to percentages of the weekly wages, and thus are based upon both wages and time worked. Despite this distinction between the *Embassy* type of fund and the typical pension fund, we believe that no pension fund has been

granted a wage priority in any bankruptcy litigation since this Court's decision in *Embassy*. It therefore appears that on account of *Embassy*, which involved a plan which was funded in an atypical manner, a precedent has been established which now deprives of wage priority plans which are funded in a far different manner.

(b) "It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever" (359 U. S. 32).

The participants named hereinabove (pp. 3-5) who did not seek or find employment with another contributing employer could have demanded and received payment of the balance in their individual accounts,[13] and eleven of these participants did so, at the rate of $50.00. per month ($60.00.

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[13] With respect to pooled pension funds, in which no individual participant accounts were kept, and which were established either by unilateral contract or by collective bargaining agreement, the Courts have held that these Plans created vested rights in employees who continue in employment for the required number of years; that a retired employee could sue to enforce these rights and that others similarly situated may be permitted to intervene. *Hurd* v. *Illinois Bell Telephone Co.* (C. A. 7, 1956), 234 F. 2d 942. *Booth* v. *Security Mutual Life Ins. Co.* (D. C. N. J. 1957), 155 F. Supp. 755. Individual employees' beneficiaries may challenge the legality of payments to the Fund and may sue for accounting, injunction and distribution of assets. See *Barbot* v. *Frackman* (D. C. N. Y. 1961), 191 F. Supp. 171. The employee's rights to benefits continues even after his employer terminates its contributions to a Welfare Fund (*Del Veccio* v. *Hood*, 4 N. J. Super. 254, 66 A. 2d 738) and after termination of the collective bargaining agreement. *New York City Omnibus Corp.* v. *Quill* (N. Y. 1948), 189 Misc. 892, aff'd 272 App. Div. 1015 and 297 N. Y. 832. A retired incompetent worker may bring suit for declaratory judgment as to his pension rights. *Hoffman* v. *Victory* (N. Y. 1953), 281 App. Div. 849. The benefits are attachable to pay support awards,

for workers leaving after January 1, 1965) (R. 10). The right of the Annuity Fund's participants to bring suits and obtain judgments for the balance in their accounts, payable in monthly installments, were such payments denied to them by the Annuity Fund, is not in dispute.

> (c). "That (Congress') purpose was to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy. These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress" (359 U. S. 33).

The Annuity Fund does offer a limited "support to the workman in periods of financial distress." The Annuity Fund's participants are most likely to experience financial distress if they do not find desired employment in the industry and cease to be participants. While such cessation of employment is not necessarily a period of financial distress (the participants may immediately go into business or commence employment in another industry or another community) surely it is the most probable period of financial distress which they may be expected to encounter. In this event they may obtain immediate return of their equity in monthly installments.

It is true that pursuant to the terms of many other pension plans the employees would not be eligible to receive

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any provision in the Plan to the contrary notwithstanding. See *Thiel* v. *Thiel* (N. J. 1964), 41 N. J. 446, 197 A. 2d 354. Upon a participant's death the beneficiaries have a vested interest. *Boyd* v. *Curran* (D. C. N. Y. 1958), 166 F. Supp. 193. These decisions apply to the Annuity Fund *a fortiori*.

monies immediately. In those instances the employees would nevertheless feel more free to withdraw sums from their regular savings accounts, secure in the knowledge that the equities which they were building up in their pension funds would be available later.

Furthermore, in view of the prevalence of unemployment compensation it may be argued that the "protective cushion" function of the wage priority has to some extent been preempted.[14] In any event, to the extent that this function is not preempted, it has not proved meaningful. This Court should judicially note that employees of employers who file petitions in bankruptcy often wait years before Trustees in Bankruptcy wind up their affairs, and file their final accounts; only after the final accounts are filed and approved are wage claims usually paid.

> (d) "Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the Welfare Plan, thus reducing his own recovery" (359 U. S. 33-34).

In fact, however, no wages payable directly to the electricians were owed to the employees of the bankrupt; furthermore, the likelihood that Annuity Fund claims could reduce recovery of wage claims is largely theoretical. No employer in the construction field could long continue operations without meeting the payroll regularly. Obligations to

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[14] See Federal Social Security Act, 49 Stat. 626-27 (1935), 42 U. S. C. Sections 501-03, authorizing appropriation of Treasury money to assist the States in administration of their Unemployment Compensation Laws.

trust funds, however, like tax obligations, usually are substantial when a bankruptcy petition is filed.

Action by Congress Is Not Required:

The Court below recognized the force of the argument that payments to the Annuity Fund should receive a wage priority. The Court stated:

> "It has been forcefully argued that contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States* v. *Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959) (Black, J. dissenting); Note, Union Retirement and Welfare Plans' Employer Contributions as "wages" Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957). But in light of the Supreme Court's decision in *Embassy Restaurant*, such an argument must be made to Congress, not to this court" (R. 10).

Since the decision in *Embassy*, Congress has mandated that the preservation of pension and welfare funds shall be supervised constantly by the Federal Government.[15]

The courts below have held that because of this Court's decision in *Embassy* the argument in favor of a wage priority must be made to Congress. We respectfully urge that Congress could not have intended that its laws which now protect the security of payments to pension funds, as

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[15] Welfare and Pension Plans Disclosure Act, 72 Stat. 997 (1958), 74 Stat. 417, 76 Stat. 35 (1962), 29 U. S. C. 301-09, 18 U. S. C. 664, 1027. See also Section 302 of the Taft-Hartley Act, 61 Stat. 157-58, 29 U. S. C., Section 186 (1947), which mandates annual audits and separate funds for payments for pensions and annuities established pursuant to collective bargaining.

well as the Regulations of the Internal Revenue Service pursuant to Section 401(a) IRC, cited heretofore, be made less meaningful on account of the depletion of these funds caused by an overly narrow construction of Section 64a(2).

The Embassy Decision Has Heretofore Been Distinguished:

The Ninth Circuit in *Sulmeyer* v. *Southern California Pipe Trades Trust Fund* (C. A. 9), 301 F. 2d 768 granted a wage priority to contributions to a Vacation and Holiday Benefit Fund and held that this Court's opinion in *Embassy* was inapplicable to that Fund. The Court below expressed no opinion concerning the validity of the rationale in *Sulmeyer,* but distinguished *Sulmeyer* upon the grounds that:

> a. "it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g. United States v. Munro-Van Helms Co., Inc., 243 F. 2d 10 (5 Cir. 1957),"
>
> b. "that taxes were withheld from employees on contributions to the Fund," and
>
> c. "that the Fund established a separate savings account for each employee" (R. 10).

With respect to these distinctions:

> a. *Munro-Van Helms* concerns vacation pay payable directly to the employees, with priority limited to one-fourth of the annual vacation pay, and is therefore not applicable to claims filed by trust funds.
>
> b. This court in *Embassy Restaurant* did not concern itself with whether income taxes were withheld from employees on contributions to the Fund. Sec.

64a(2) was enacted in 1841 (c. 9, 5 Stat. 444), when there were, of course, no income taxes to withhold. We respectfully urge that the Congress which enacted Section 64a(2) did not intend to deprive any claims of the status of wages because the payments were owing pursuant to an arrangement made to postpone and minimize income taxes. "Wages * * * due to workmen" should not be construed to read *wages due to workmen provided, however, that the United States collects some of these wages first.*

c. While the Annuity Plan did not establish a separate savings account for each of its more than 10,000 employee participants, it does substantially the same thing. The Annuity Plan sends to each participant a monthly statement setting forth the total contributions received on his behalf, together with the dividends currently added thereto. Each statement sets forth each participant's total vested interest in the Annuity Plan.

This Court in *Embassy* (359 U. S. at 34, 38-39) discussed *Shropshire Woodliff & Co.* v. *Bush*, 204 U. S. 186, and particularly the citation therein that "The (wage) priority is attached to the debt, and not to the person of the creditor. * * *", and held that the application of this principle did not help the legal position of the Welfare Fund. We respectfully urge that the *Shropshire* principle is nevertheless applicable to the Annuity Fund herein. The Ninth Circuit in *Sulmeyer* applied the *Shropshire* principle to the Vacation and Holiday Fund therein, and stated:

"The facts of this case bring it into closer alignment to the 'assigned wage claim' cases than to Embassy Restaurant, supra" (301 F. 2d at 771).

This Court has authority to deviate from the priorities set forth in the Bankruptcy Act in the interests of justice and equity (*Sampsell* v. *Imperial Paper Corp.*, 313 U. S. 215). What principle of equity preserves the right of a speculator who purchases wage claims in quantity, or the right of a surety through subrogation (*Home Indemnity Corp.* v. *F. H. Donovan Painting Co.*, C. A. 8, 1963, 325 F. 2d 870) to enforce priority wage claims, yet denies that same right to trustees who are conserving wages pursuant to a government approved (I. R. C., Section 401) plan?

This Court recognized the force of this argument in *United States* v. *Carter*, 353 U. S. 210 (1957), an action which concerned the liability of a surety on a Miller Act payment bond, when this Court held that payment to Trustees of a Health and Welfare Fund must be covered by such payment bond, since under the Miller Act such bond is required "for the protection of all persons supplying labor. * * *." This Court stated:

> "If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment * * *.
>
> "Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and

those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and all other construction workers. For purposes of the Miller Act these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash." *United States* v. *Carter, supra,* at pp. 219-20.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Dated: January 1968.

Respectfully submitted,

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